WONG KUAN KAY v. ROHAIZAD OTHMAN & ANOR; MAJLIS PERBANDARAN JOHOR BAHRU TENGAH (THIRD PARTY) & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
MOHD ZAWAWI SALLEH JCA
UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEALS NO: J-01-13-01-2013 & J-01-35-01-2013]
5 DECEMBER 2014

DAMAGES: *Quantum – Multiplier – Road accident – Action for recovery of loss and damages for personal injury – Motorbus driven by first defendant collided into motorcycle ridden by plaintiff when first defendant tried to avoid potholes – Local authority brought in as third party to indemnify sums that might be awarded to plaintiff – Sessions Court apportioned 80% blame to defendants and 20% to third party – Decision affirmed by High Court – Appeal against quantum by all parties – Whether discount for contingencies reasonable*

TORT: *Road accident – Liability – Action for recovery of loss and damages for personal injury – Motorbus driven by first defendant collided into motorcycle ridden by plaintiff when first defendant tried to avoid potholes – Local authority brought in as third party to indemnify sums that might be awarded to plaintiff – Sessions Court apportioned 80% blame to defendants and 20% to third party – Whether first defendant could have avoided accident had he kept proper lookout – Whether third party aware of potholes on road – Whether third party took necessary measures to maintain and repair potholes on road*

The present appeals stemmed from an action in the Sessions Court brought by the appellant ('the plaintiff') to recover loss and damages for personal injuries which he suffered from due to an accident in which the motorbus driven by the first appellant ('the first defendant') collided into the motorcycle ridden by the plaintiff. According to the first defendant, he had swerved and entered into the opposite lane to avoid the potholes and thereafter, knocked into the plaintiff. The defendants brought in the third party to indemnify for any sums that might be awarded to the plaintiff against the defendants since the third party, being the local authority, was responsible for the maintenance and repairing of the road where the accident occurred. At the conclusion of the trial, the Sessions Court Judge ('SCJ') apportioned 80% of the blame to the defendants and 20% to the third party. Dissatisfied with the decision of the Sessions Court, all the parties appealed to the High Court against the findings as to the quantum, liability and interest. The High Court Judge allowed the plaintiff's appeal in part and awarded RM10,000 for loss of marriage prospect while the defendants' and third party's appeals were dismissed. Hence, the present appeals. The

A plaintiff appealed against the quantum and interest while the defendants appealed against liability. The third party filed cross appeals in both appeals against both liability and quantum.

Held (dismissing appeals)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

B

(1) The evidence revealed that when the first defendant realised the existence of two large potholes about 20 feet in front of him on his travel path, he swerved to avoid the potholes. Had he kept a proper lookout, the first defendant would have seen the plaintiff earlier and would possibly have been able to take evasive actions. (para 12)

C

(2) The third party was aware of the existence of the potholes. Evidence showed that the complaints received from the public in respect of the potholes were forwarded to the developer who was carrying out construction works on the said road. The third party should have known or foreseen that the works would cause some danger to the public. Therefore, the third party had breached its statutory duty when it failed to ensure that the road was safe for public use. (para 17)

D

(3) The issues at hand were whether the plaintiff should continue to stay in an institutionalised facility or whether he should be taken care of at home. Based on the medical experts' evidence, the plaintiff's need would be best served if he was taken care at home with a maid to assist him; meaning that for the remaining 28 years, the multiplicand should be RM1,200 per month. (paras 30 & 31)

E

(4) The court was not persuaded by the plaintiff's contention that it was wrong for the SCJ to deduct 1/3 contingencies from the global sum. The SCJ had accepted the clinical judgment of 30 years to be the plaintiff's life expectancy. Sickness, accident and unemployment were contingencies that might affect future earnings. The SCJ's exercise in discounting 'contingencies and hazards of life' in the context of costs of future care was based upon a different consideration. (paras 33 & 36)

F

G

(5) The multiplier is not a real number of years. If a claimant were to be given his or her loss for a real number of years, it would result in considerable over-compensation since that figure would not take into account the effect of accelerated receipt. Besides, the plaintiff might live longer than anyone expected. Therefore, the courts have made reduction for contingencies to cater for accelerated receipt, contingencies and all the variables and uncertainties with regard to the future. (para 38)

H

Bahasa Malaysia *Translation Of Headnotes*

I

Rayuan-rayuan ini berbangkit daripada satu tindakan di Mahkamah Sesyen yang dimulakan oleh perayu ('plaintif') yang menuntut ganti rugi dan pampasan bagi kecederaan-kecederaan yang dialami olehnya akibat kemalangan dalam mana bas yang dipandu oleh perayu pertama ('defendan

pertama') telah melanggar motosikal yang ditunggang oleh plaintif. Menurut defendan pertama, dia telah membelok dan memasuki lorong bertentangan untuk mengelak jalan yang berlubang dan selepas itu melanggar plaintif. Defendan-defendan memasukkan pihak ketiga untuk menanggung rugi sebarang jumlah yang mungkin diawardkan kepada plaintif terhadap defendan-defendan memandangkan pihak ketiga, sebagai pihak berkuasa tempatan, bertanggungjawab bagi penyelenggaraan dan pembaikan jalan di mana kemalangan tersebut berlaku. Di penutup kes perbicaraan, Hakim Mahkamah Sesyen ('HMS') membahagikan tanggungan sebanyak 80% kepada defendan-defendan dan 20% kepada pihak ketiga. Tidak berpuas hati dengan keputusan Mahkamah Sesyen, kesemua pihak merayu kepada Mahkamah Tinggi terhadap dapatan-dapatan kuantum, liabiliti dan faedah. Hakim Mahkamah Tinggi membenarkan sebahagian rayuan plaintif dan mengawardkan RM10,000 bagi kehilangan prospek perkahwinan manakala rayuan-rayuan oleh defendan-defendan dan pihak ketiga ditolak. Oleh itu, rayuan-rayuan ini. Plaintif merayu terhadap kuantum dan faedah manakala defendan-defendan merayu terhadap liabiliti. Pihak ketiga memfailkan rayuan balas dalam kedua-dua rayuan terhadap liabiliti dan kuantum.

Diputuskan (menolak rayuan-rayuan)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Keterangan mendedahkan bahawa apabila defendan pertama menyedari akan kewujudan dua jalan yang berlubang besar kira-kira 20 kaki di hadapannya di jalan perjalanannya, dia telah membelok untuk mengelakkan jalan berlubang tersebut. Sekiranya dia melihat dengan cermat, defendan pertama akan menyedari bahawa plaintif terlebih dahulu dan mungkin boleh mengelak.

(2) Pihak ketiga sedar akan kewujudan jalan yang berlubang ini. Keterangan menunjukkan bahawa aduan-aduan yang terima daripada pihak awam berkenaan jalan yang berlubang tersebut telah dihantar kepada pihak pemaju yang menjalankan kerja-kerja pembinaan di atas jalan tersebut. Pihak ketiga sepatutnya tahu atau boleh menjangka bahawa kerja-kerja tersebut akan menyebabkan bahaya kepada pihak awam. Oleh itu, pihak ketiga telah melanggar tanggungjawab statutorinya apabila ia gagal untuk memastikan jalan tersebut selamat bagi kegunaan awam.

(3) Isu-isu yang perlu ditangani adalah sama ada plaintif patut terus tinggal dalam fasiliti yang diinstitusikan atau sama ada dia patut dijaga di rumah. Berdasarkan keterangan pakar perubatan, keperluan plaintif akan dipenuhi sekiranya dia dijaga di rumah dengan seorang pembantu untuk membantunya; bermaksud bahawa untuk 28 tahun seterusnya, *multiplicand* sepatutnya adalah RM1,200 sebulan.

(4) Mahkamah tidak menerima hujahan plaintif bahawa adalah khilaf untuk HMS menolak 1/3 luar jangkaan daripada jumlah global. HMS telah menerima penghakiman klinikal jangka hayat plaintif selama 30 tahun. Penyakit, kemalangan dan pengangguran adalah perkara-perkara luar jangkaan yang mungkin memberi kesan kepada pendapatan masa hadapan. Langkah yang diambil oleh HMS dalam mengurangkan perkara-perkara luar jangkaan dan bahaya dalam kehidupan dalam konteks kos jagaan masa hadapan adalah berdasarkan pertimbangan lain.

(5) Pendarab bukanlah bilangan tahun yang sebenar. Sekiranya seseorang pihak yang menuntut diberikan ganti rugi bagi jumlah tahun yang sebenar, ia akan mengakibatkan pampasan berlebihan kerana angka tersebut tidak akan mengambil kira kesan penerimaan yang telah dipercepatkan. Selain itu, plaintif mungkin akan hidup lebih lama daripada yang dijangka oleh semua orang. Oleh itu, mahkamah-mahkamah telah mengurangkan perkara-perkara luar jangkaan untuk memenuhi penerimaan yang telah dipercepatkan, perkara-perkara luar jangkaan dan kesemua pembolehubah dan ketidakpastian berkenaan masa hadapan.

Case(s) referred to:

Andrews v. Grand & Toy Alberta Ltd (1978) 3 CCLT 225 ***(refd)***
Arnold v. Teno (1978) 3 CCLT 272 ***(refd)***
Bresatz v. Przibilla [1962] 108 CLR 541 ***(refd)***
Bujang Mat & Anor v. Lai Tzen Hai & Anor [2004] 4 CLJ 127 HC ***(refd)***
Ng Chun Loi v. Hadzir Yunus & Ors [1993] 1 CLJ 323 HC ***(refd)***
Sharman v. Evans (1977) 138 CLR 563 ***(refd)***
Starff v. Wilson [1986] 39 CCLT 20 (BS SC) ***(refd)***
Tan Ah Kau v. The Government of Malaysia [1997] 2 CLJ Supp 168 HC ***(refd)***
Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***
Thornton v. Board of School Trustees (1978) 3 CCLT 257 ***(refd)***
Topaiwah v. Salleh [1968] 1 LNS 161 FC ***(refd)***
Wells v. Wells, Thomas v. Brighton Health Authority and Page v. Sheerness Steel Co [1999] 1 AC 345 ***(refd)***

Legislation referred to:

Street, Drainage and Building Act 1974, s. 4
Subordinate Courts Rules 1980, O. 29 r. 12

Other source(s) referred to:

Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd edn (Carswell, 1996), pp 449-450
Klar, Linden, Cherniak, & Kryworuk, *Damages and Remedies in Tort* (Carswell, 1995), pp 56 & 76

(Civil Appeal No: J-01-13-01-2013)

For the appellant - Chandrika J (Teo Han Ley with her); M/s Teo & Assocs
For the respondent - Razlan Hadri Zulkifli (Khairul Aiman with him); M/s Viknes Ratna & Co

(Civil Appeal No: J-01-35-01-2013)

For the appellant - Razlan Hadri Zulkifli (Khairul Aiman with him); M/s Viknes Ratna & Co

For the respondent - Chandrika J (Teo Han Ley with her); M/s Teo & Assocs

For the 3rd party - Harikannan Ragavan (Barvina Punnusamy with him); M/s Jayadeep Hari & Jamil

[Editor's note: For the High Court judgment, please see Wong Kuan Kay v. Rohaizad Othman & Anor; Majlis Perbandaran Johor Bahru Tengah (Third Party) & Another Case [2012] 1 LNS 897.]

Reported by Najib Tamby

JUDGMENT

Mohd Zawawi Salleh JCA:

[1] There are two appeals before us, namely, Civil Appeal No. J-01-13-01-2013 (first appeal) and Civil Appeal No. J-01-35-01-2013 (second appeal) against the decision of the High Court at Johor Bahru dated 21 December 2012. For convenience and ease of reference, we will refer to the parties in this judgment as in the manner they were referred to in the Sessions Court.

[2] The first appeal was filed by the plaintiff against quantum and interest. The second appeal was filed by the defendants against liability. The third party being the Majlis Perbandaran Johor Bahru Tengah ("third party") filed cross-appeals in both appeals against both liability and quantum.

[3] The action in the Sessions Court was brought by the plaintiff to recover loss and damages for personal injuries suffered by him as a result of an accident which occurred on 6 September 2008, when the motorbus driven by the first defendant, collided into the motorcycle ridden by the plaintiff.

[4] It was the defendants' case that the first defendant had swerved to his right thus entered into the opposite lane to avoid the potholes and thereafter knocked into the plaintiff. The defendants brought in the third party to indemnify for any sums that may be awarded to the plaintiff against the defendants since the third parties, being the local authority, is responsible to maintain and repair the road where the accident occurred.

[5] At the conclusion of the trial, the learned Sessions Court Judge apportioned 80% of the blame to the defendants and 20% to the third party. The learned Sessions Court Judge assessed and awarded the plaintiff the following amounts under various heads of damages:

(i) Pain and suffering: RM232,000;

(ii) Loss of earnings: RM91,008:

(iii) Medical expenses: RM14,219;

(iv) Costs of care and other related expenses: RM347,300; and

(v) Other miscellaneous expenses: RM945.

[6] The learned Sessions Court Judge also awarded interest on the special damages at 2%, on general damages at 4% and on the judgment sum at 6%, until full and final settlement.

[7] All the parties being dissatisfied with the decision of the Sessions Court, appealed to the High Court. The plaintiff appealed against the findings as to the quantum and interest. The defendants and the third party appealed against the findings as to liability and quantum.

[8] The learned High Court Judge allowed the plaintiff's appeal in part and awarded RM10,000 for loss of marriage prospect. The defendant's and the third party's appeals were dismissed. Hence, these appeals and cross-appeals.

[9] On 20 August 2014, we heard these appeals and after hearing submissions from counsel, we reserved our judgment. We now give our decision and our reasons in respect of these appeals.

Liability

[10] We will deal with the appeal and cross-appeal on liability first.

[11] The defendants' complaint was that the learned Sessions Court Judge erred in apportioning only 20% liability on the third party. Learned counsel for the defendants submitted that a heavier share of liability ought to be imposed on the third party because the third party, being the local authority, was responsible for the maintenance of the road. Learned counsel for the defendants submitted that the third party was negligent for failing to maintain the road. There was no warning signage put up near or around the accident area. In short, road users were left to their own devices in dealing with the potholes. It was suggested by learned counsel for the defendants that a fair and reasonable apportionment of liability for the third party should be 75%.

[12] After considering all of the evidence, we found that the findings of the learned Session Court Judge, affirmed by the High Court, were supported by the evidence. The evidence reveals that at the material time, the first defendant was driving the bus at the speed of 40 to 50 km/h, carrying 44 passengers. While approaching the crash site, he realised the existence of two large potholes on his travel path, about 20 feet in front of him. He swerved to the right to avoid the potholes. When he saw the plaintiff, he tried to apply the brakes but could not avoid colliding into the plaintiff's motorcycle.

[13] It was clear that the first defendant maneuvered the bus to the right and into the opposite lane because there was not enough space at the nearside of the road. But he failed to keep a proper lookout when he swerved to the right into the opposite lane. If he had kept a proper lookout, he would have seen the plaintiff earlier and possibly would have been able to take evasive actions.

[14] With regard to the third party's cross appeal, learned counsel submitted that Majlis Perbandaran Johor Bahru Tengah was unaware of the potholes prior to the accident. As such, by finding the third party partly liable, the courts below had imposed an unreasonably high standard of care on the local authority.

[15] In our considered view, the scope of authority and powers of the third party to maintain the road in question must be seen within the context of the provisions of the Street, Drainage and Building Act 1974 (the Act). Section 4 provides as follows:

> (1) The local authority shall, so far as the funds at its disposal will admit, cause all public streets together with the footways thereof, whether covered by arcades or not, to be maintained and repaired and may -
>
> (a) cause the same to be paved, metalled, flagged, channelled, drained, kerbed, lighted or otherwise improved, and the surface thereof to be raised, lowered or altered as it thinks fit;
>
> (b) make and keep in repair any footways for the use of foot passengers in any such street;
>
> (c) place on the sides of such footways or otherwise such fences and posts as are needed for the protection of foot passengers;
>
> (d) provide street lighting.

[16] Based upon the above provisions, the local authority is under a duty to ensure that the public street is kept in good repair, and may be used with comfort and safety. Proper maintenance would involve regular and effective inspections to be conducted by the third party.

[17] The third party was aware of the existence of the potholes. En Rosaidi bin Ibrahim, an engineer of the third party and a technical assistant at the material time, testified that the complaints received from the public in respect of the potholes were forwarded to the developer who was carrying out construction work on the said road. The third party should have known or foreseen that the works which were being executed would cause some obstruction or some danger to the public. Therefore, the third party had breached its statutory duty when it failed to ensure that the road was safe for public use.

[18] It is trite law that the appellate court should be slow to disturb the trial judge's decision on the apportionment of liability except where there is a strong and cogent reason to do so.

[19] The respondents and the third party have not persuaded us that the trial judge's finding of facts was plainly wrong or he failed to appreciate the evidence properly.

[20] Therefore, the defendants' and third party's cross-appeal on liability must fail.

Quantum

[21] We now proceed to deal with the plaintiff's appeal and the third party's cross-appeal on quantum.

[22] Although the plaintiff appealed against the whole of the award on damages, at the hearing of the appeal, counsel for the plaintiff informed the court that they were confining their appeal to award for costs of nursing care and interest only. The third party's cross-appeal on quantum is against the High Court's award of RM10,000 for loss of marriage prospects and costs of nursing care.

[23] It is the third party's contention that by making this award, it would amount to double recovery as the learned Sessions Court Judge had made an award for general damages, including pain and suffering.

[24] With respect, we disagree. Under the common law, loss of marriage prospects is general damages subsumed under the head of loss of amenities of life (See *Sharman v. Evans* (1977) 138 CLR 563, *Scarff v. Wilson* [1986] 39 CCLT 20 (BS SC). In the present case, the plaintiff, aged 16, was severely injured in the accident and became quadriplegic with a further life expectancy of 30 years. He will never be free of the daily ordeal of suffering, and his right to have social intercourse, prospect of finding a partner, is either greatly impaired or destroyed. Therefore, there is nothing unreasonable for the learned High Court Judge to award RM10,000 for loss of marriage prospects.

[25] We, therefore, dismiss the third party's cross-appeal in respect of this award.

[26] We now turn to discuss the plaintiff's appeal in respect of nursing care. Assessing damages to meet the costs of future care is based upon the principle of *restitution in integrum*. This basic principle was enunciated, *inter alia*, by the Supreme Court of Canada in *Andrews v. Grand & Toy Alberta Ltd* 1978 3 CCT 225 (SCC), where Dickson J stated at pp. 241 to 242:

> 25. In theory a claim for the costs of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury. Obviously, a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, *restitutio in integrum* is not possible. Money is a barren substitute for health and personal happiness, but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of a claim.

[27] The law, adopts a method for the calculation or capitalisation of the anticipated costs. It achieves this by the application of a multiplier to a multiplicand. The multiplier is the figure to reflect the length of time over which care is to be provided. The multiplicand is the cost of the annual future care and/or treatment.

[28] Against this backdrop, we turn to consider the issue at hand. In making his award under this head of claim, the learned Sessions Court Judge decided that the plaintiff could expect to live another 30 years. The learned Sessions Court Judge then divided the 30 years into two periods, namely, the first two years (the first period) when the plaintiff would require full time nursing care, and the next 28 years (the second period) by which time the plaintiff would only require partial care. In respect of the first period, the learned Sessions Court Judge assessed the costs of nursing care at RM3,400 x 12 x 2 years = RM81,600. In respect of the second period, the learned Sessions Court Judge assessed the costs of nursing care at RM1,200 x 12 x 28 years = RM403,200. The learned Sessions Court Judge then awarded RM14,400 for physiotherapy and transportation respectively, and RM7,200 for diapers. The total award under this head came up to RM520,800. The learned Sessions Court Judge then deducted 1/3 from that figure for contingencies giving an award of RM347,200.

[29] We will begin by discussing the issue of the multiplicand. In the present case, there are two multiplicands ie, RM3,400 for the two years and RM1,200 for the remaining 28 years. Though it was not stated in the learned Sessions Court Judge's grounds of judgment what he meant by full time nursing care and partial care, parties agreed that full time nursing care would mean that the plaintiff would be cared for at City Heart Care, and partial care would be cared for at home by engaging a domestic helper.

[30] The issue before us is whether the plaintiff should continue to stay in an institutionalised facility or whether he should be taken care of at home. It is the plaintiff's submission that he should continue to stay at City Heart Care and the multiplicand of RM3,400 should be maintained throughout the 30 years. The defendants' position is that the multiplicand of RM3,400 is for two years only; and the multiplicand of RM1,200 for the remaining 28 years.

[31] In our view, there was sufficient evidence before the learned Sessions Court Judge to enable him to decide as to the multiplicands to apply. Based on the medical experts' evidence, we find no reason to disturb the learned Sessions Court Judge's finding that the plaintiff's need would be best served if he was taken care at home with a maid to assist him; meaning that for the remaining 28 years the multiplicand should be RM1,200 per month.

[32] In fact, home care is always favourable in the common law jurisdiction. For example, in *Andrews* (*supra*), the plaintiff, a young adult, had been rendered a quadriplegic by the accident in question. In deciding whether institutional care or home care would be preferable for the plaintiff in question, the court had this to say at p. 239:

> The standard to be applied to Andrews is not merely 'provision', but 'compensation', that is what is the proper compensation for a person who would have been able to care for himself and live in a home environment if he had not been injured? The answer must surely be home care. If there were severe mental impairment or the case of an immobile quadriplegic, the results might well be different; but where the victim is mobile and still in full control of his mental facilities, as Andrews is, it cannot be said that institutionalization in an auxiliary hospital represents proper compensation for his loss. Justice requires something better.

[33] In *Thornton v. Board of School Trustees* (1978) 3 CCLT 257 (SCC) and *Arnold v. Teno* (1978) 3 CCLT 272 (SCC) , the Canadian Supreme Court also decided that home care is preferable in the circumstances of the injured victim. Nevertheless, the court was not laying down as an immutable principle that home care is invariably the proper standard of care. However, since there was nothing before us to demonstrate that the trial judge had erred by omitting some relevant consideration or admitted some irrelevant consideration or the amount is plainly unreasonable we are reluctant to interfere with the award made by the trial judge. (See *Topaiwah v. Salleh* [1968] 1 LNS 161; [1968] 1 MLJ 284, *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323)

[34] We now turn to the next issue. The decision of the learned Sessions Court Judge to deduct 1/3 contingencies was affirmed by the learned High Court Judge. His Lordship allowed the plaintiff's appeal in part by awarding RM10,000 for loss of marriage prospects. Both plaintiff as well as the third party are dissatisfied with the above award.

[35] The plaintiff's complaint was that it was wrong for the learned Sessions Court Judge to deduct 1/3 contingencies from the global sum. The relevant contingencies such as sickness, accident, unemployment and premature death have been taken into account when the specialist came to a consensus of 30 years being the plaintiff's life expectancy after the injury. There is no place for actuarial input into the calculation in respect of costs of future nursing care when the expert medical witness has already, in producing a median figure for life expectancy, allowed for the possibility of both earlier and later death. It is the plaintiff's submission that he should be entitled to full compensation and the court should have to do no more than apply a mathematical multiplier without allowance for mortality. The plaintiff contended that any further deduction for contingencies amounts to a double deduction.

[36] With respect, we are not persuaded by the plaintiff's argument. The learned trial judge had accepted that the clinical judgment of 30 years to be the plaintiff's life expectancy. Sickness, accident and unemployment are contingencies that may affect future earnings. The trial judge's exercise in discounting contingencies and hazards of life in the context of costs of future care was based upon a different consideration.

[37] In Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd edn (Carswell, 1996), the learned author pointed out that, at pp. 449 to 450:

> It is now clear that contingencies under damages for cost of future care should be given separate consideration from those relating to future loss of earnings. The analysis under the claim for cost of care is done for a different reason: "The 'contingencies and hazards of life' in the context of future care are distinct. They relate essentially to duration of expense and are different from those which might affect future earnings, such as unemployment, accident, illness. The inquiry under the two heads of damage has a different focus. Whereas the concern under loss of earnings is mostly into "what would have been, but for the accident", the cost of care inquiry is into "what will now occur, as a result of the accident". Of course, some of the contingency question under loss of earnings may relate to the plaintiff's post-accident prospects. Equally, there may be cases where a contingency reduction is justified under cost of care because of the possibility that a similar expense would have been incurred anyways, without the accident.

[38] It is important to note that the multiplier is not a real number of years. If a claimant were to be given his or her loss for a real number of years, it would result in considerable over-compensation since that figure would not take into account the effect of accelerated receipt (ie, the fact that the plaintiff will receive the money at the time the calculation is made, rather than when the expense is actually incurred). Further, the plaintiff may live longer than anyone expected. Therefore, the courts have, as a matter of practice, made reduction for contingencies to cater for accelerated receipt, contingencies and all the variables and uncertainties with regard to the future. In Klar, Linden, Cherniak & Kryworuk, *Damages and Remedies in Tort* (Carswell, 1995), the authors stated the following at p. 56:

> This head of damages (costs of future care) is the post-trial equivalent to that dealing with expenses incurred prior to trial. It is commonly known as costs of future care and covers all expenses which would have been incurred but for the injury. It includes the future cost of medical treatment and other expenses required to provide the plaintiff with the lifestyle enjoyed prior to the injury. Generally, the costs of future care take into consideration the following factors: i) the costs of care; ii) the duration of the expense; iii) contingencies; iv) the discount rate; and v) the overlap factor.

[39] The authors further stated in p. 76 that:

> ... Contingencies affecting damages for cost of future care relate to the duration of the expense and possibility that the plaintiff will not require the anticipated level of care for the estimated length of time, for example, the possibility that the plaintiff's deteriorating condition would require institutional rather than home care.

[40] Therefore, the deduction of 1/3 for contingencies by the learned Sessions Court Judge relate essentially to the duration of expense and the possibility that the plaintiff will not require the anticipated level of care for the estimated length of time. To vary an award by the value of the chance that certain contingencies may occur is to assure neither over-compensation nor under-compensation, depending on whether or not the event occurs. In light of the considerations we have mentioned, we are of opinion that it would be reasonable to allow a discount for contingencies. Further, this is a normal and recognised approach originating from common law. In the case of *Bujang Mat & Anor v. Lai Tzen Hai & Anor* [2004] 4 CLJ 127, the plaintiff was 22 years old at the time of accident and had suffered from severe brain damage and had become vegetative. The learned Sessions Court Judge made no deduction for contingencies when making an award in respect of costs of nursing care. In reviewing this issue, Clement Skinner J (as he then was) held that to arrive at the loss, the learned Sessions Court Judge should have made an allowance of 1/3 for contingencies. The cases that have adopted this approach are *Tan Ah Kau v. The Government of Malaysia* [1997] 2 CLJ Supp 168; [1997] 2 AMR 1382, *Ng Chun Loi v. Hadzir Yunus & Ors* [1993] 1 CLJ 323.

[41] Learned counsel for the plaintiff cited the case of *Bresatz v. Przibilla* [1962] 108 CLR 541 in support of his contention that there is no necessity of scaling down for contingencies. The Australian High Court per Windeyer J, at pp. 543 to 544, stated as follows:

> It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future might have held for the particular individual concerned ... Moreover, the generalization, that there must be a 'scaling down' for contingencies, seems mistaken. All 'contingencies' are not adverse: all 'vicissitudes' are not harmful ...

[42] With respect, the plaintiff's reliance on *Bresatz* is misplaced. The above case is not an authority for the proposition that there should be no judicial discount to reflect contingencies in light of medical evidence on the plaintiff's life expectancy. While some contingencies of life may reflect a plaintiff's misfortune, some may be in his or her favour and countervail negative contingencies. Because of this balance between possible negative and positive contingencies, the Australian High Court remarked that deduction for contingencies, though transitional, is not mandatory. Expert evidence is a useful basis for establishing the quantum. Even so, the court still has a wide discretion with regard to contingency adjustments.

[43] Learned counsel for the plaintiff also finds support from the following remarks by the House of Lords in *Wells v. Wells, Thomas v. Brighton Health Authority and Page v. Sheerness Steel Co* [1999] 1 AC 345 at pp. 378 to 379:

> where the judge had accepted medical evidence as to the plaintiff's life expectancy, there was no justification for any discount in respect of the contingencies of life ...
>
> ... In the case of life expectancy, the contingency can work in either direction. The plaintiff may exceed his normal expectation of life, or he may fall short of it ... There is no purpose in the courts making as accurate prediction as they can of the future needs if the resulting sum is reduced for no better reason than the prediction might be wrong. A prediction remains a prediction. Contingencies should be taken into where they work in one direction, but not where they cancel out. There is no more logic or justice in reducing the whole life multiplier by 15% or 20% on agreed expectation of life than there would be in increasing it by the same amount.

[44] *Wells v. Wells* is an important decision and it is regarded as a firm admonition of the House of Lords against discounting the arithmetical whole life multiplier. The case has paved the way for the English courts to jettison the conventional approach in favour of actuarial and/or expert evidence. The House of Lords sanctioned the evidence as provided in the Ogden Tables, an actuarial table based on the English Life Tables which contain information on contingencies and a list of justifiable deductions. Multipliers under the Ogden tables are adjusted so as to reflect a discount for earlier receipt. The tables were created to overcome the unsatisfactory nature of the conventional approach in selecting an appropriate multiplier.

[45] The above case may be useful as a guide as to the policy in England, but it is not useful in our jurisdiction. Lord Lloyd's remarks in *Wells v. Wells* were made in a context where the actuarial tables were available as an alternative to the conventional approach in quantifying the multiplier. In the absence of actuarial tables, the decision of the learned Sessions Court Judge to deduct 1/3 for contingencies, cannot be regarded as erroneous in law.

[46] The determination of the appropriate multiplier is fraught with difficulty, for it is in large measure pure speculation. However, in the absence of actuarial tables, it seems to us that the approach as adopted by our courts making adjustments for contingencies, is the next most appropriate approach.

[47] For the above reasons, we dismiss the plaintiff's appeal on costs of nursing care. We affirm the decision of the Sessions Court and the High Court. And it follows that the third party's cross appeal in respect of quantum must also be dismissed.

[48] Concerning the interest rate, we affirm the learned Sessions Court Judge's award on interest on the above amounts. The decision was delivered before the Rules of Court 2012 came into force. Under the old Rules, O. 29 r. 12 of the Subordinate Court Rules 1980, provides that the interest shall not exceed 8% per annum. There is no imposition of a specific rate. The rate of interest awarded is a discretionary power exercised by the court. The plaintiff has not shown where the trial judge had erred in his discretion to award the rate of interest as he did.

[49] The plaintiff's appeal on interest is also dismissed.

Conclusion

[50] For the foregoing reasons, we dismiss both appeals. Each party to bear own costs.